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Attorneys for Defendant

CALIFORNIA PACIFIC MEDICAL CENTER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER JAY GERBER and MIRIAM
GOLDBERG,

Plaintiffs,

v,

BAYER CORPORATION AND BAYER
HEALTHCARE PHARMACEUTICALS, INC.;
BMC DIAGNOSTICS, INC.; CALIFORNIA
PACIFIC MEDICAL CENTER; GENERAL
ELECTRIC COMPANY; GE HEALTHCARE,
INC.; GE HEALTHCARE BIO-SCIENCES
CORP.; McKESSON CORPORATION;
MERRY X-RAY CHEMICAL CORP., and
Does 1 through 35,

Defendants

CASE NO. 3:07-CV-05918 JSW

**ANSWER OF CALIFORNIA PACIFIC
MEDICAL CENTER TO COMPLAINT TO
PLAINTIFFS' COMPLAINT**

JURY TRIAL DEMANDED

GENERAL DENIAL

1. Pursuant to the provisions of section 431.30 of the Code of Civil Procedure of the State of California, Defendant California Pacific Medical Center ("CPMC") denies both generally and specifically each, every and all of the allegations in Plaintiffs' unverified Complaint, and the whole thereof, including each and every purported cause of action contained therein. Defendant further denies that Plaintiffs have been injured or damaged or are entitled to any relief whatsoever against CPMC.

2. Further answering the Complaint on file herein, and the whole thereof, this answering defendant denies that Plaintiffs have sustained any injury, damage or loss, if any, by reason of any negligent act, error, omission or breach of duty on the part of this answering defendant, or any agents, servants, or employees of this answering defendant.

FIRST AFFIRMATIVE DEFENSE

AS AND FOR A FIRST, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs have failed to state facts sufficient to constitute a cause or causes of action against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

AS AND FOR A SECOND, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs' action is barred by all applicable statute of limitations, including but not limited to Code of Civil Procedure section 340.5. In accordance with the provisions of California Code of Civil Procedure, this answering defendant requests a separate trial of this affirmative defense of the statutes of limitations before the trial of any other issues.

THIRD AFFIRMATIVE DEFENSE

AS AND FOR A THIRD, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that some or all of plaintiffs' claims are barred or otherwise without basis for failure to comply with Code of Civil Procedure section 364.

FOURTH AFFIRMATIVE DEFENSE

AS AND FOR A FOURTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, plaintiffs' claims are barred, in whole or in part, by laches, waiver and/or estoppel.

FIFTH AFFIRMATIVE DEFENSE

AS AND FOR A FIFTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant, generally and specifically, denies that any wrongdoing, negligence, or liability on its part. However, should it be determined that this answering defendant is liable, which premise is denied and asserted solely for purposes of interposing this defense, then Defendant further alleges that the injuries and losses alleged by Plaintiffs, if there were any, were proximately caused by the negligence, carelessness and/or fault of other persons, firms,

1 corporations, or entities other than this answering defendant, and that the court is respectfully
 2 requested to instruct the jury to apportion fault for any injury and loss, if any there were, which
 3 were negligently caused by and/or amongst all persons, firms, corporations or other entities, other
 4 than this answering defendant, who they find was negligent, careless and/or at fault for the injuries
 5 and losses, if any there were.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 AS AND FOR A SIXTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this
 8 answering defendant alleges on information and belief that Plaintiffs herein are barred from any
 9 recovery herein on the basis that Plaintiffs' own negligence was the sole and proximate cause of the
 10 injuries sustained herein, if any. However, if a finding is made that this answering defendant was
 11 negligent and proximately contributed to Plaintiffs' injuries and/or damages, which premise is
 12 denied and asserted solely for the purposes of interposing this defense, Plaintiffs' amount of
 13 recovery, if any, shall be reduced on the basis of his comparative negligence which contributed to
 14 the incident herein and the injuries and/or damages and claims upon which Plaintiffs are seeking
 15 recovery against this answering defendant.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 AS AND FOR A SEVENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE,
 18 the injuries and damages claimed by Plaintiffs, if any there were, resulted from an intervening or
 19 superseding cause and/or causes, and any act or omission on the part of this answering defendant
 20 was not the proximate cause of Plaintiffs' alleged injuries and damages.

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 AS AND FOR AN EIGHTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE,
 23 this answering defendant alleges that any injuries or damages suffered by Plaintiffs herein were
 24 caused by risks, hazards and dangers to which Plaintiffs voluntarily consented and voluntarily
 25 assumed. Plaintiffs' recovery is barred, or should be reduced, by Plaintiffs' assumption of the risk.

26 **NINTH AFFIRMATIVE DEFENSE**

27 AS AND FOR A NINTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this
 28 answering defendant may elect to introduce evidence of amounts paid or payable, if any, as a

benefit to plaintiffs, pursuant to Civil Code section 3333.1. Defendant denies that Plaintiffs have been damaged or injured in any amount, and raises the foregoing as an affirmative defense only, and premises liability solely for purposes of interposing this defense.

TENTH AFFIRMATIVE DEFENSE

AS AND FOR A TENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs are not entitled to recover damages for non-economic losses in excess of the amount specified in Civil Code section 3333.2.

ELEVENTH AFFIRMATIVE DEFENSE

AS AND FOR AN ELEVENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that certain limitations in regard to fees shall apply to any recovery for damages, if any is had, pursuant to Business and Professions Code section 6146.

TWELFTH AFFIRMATIVE DEFENSE

AS AND FOR A TWELFTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that if there is a judgment in favor of said Plaintiffs and against this answering defendant, and if such recovery exceeds \$50,000, that such damages be subject to periodization pursuant to California Code of Civil Procedure section 667.7.

THIRTEENTH AFFIRMATIVE DEFENSE

AS AND FOR A THIRTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges, on information and belief, that certain sums have been or will be paid to Plaintiffs in compensation for the same damages they seek against this Defendant and therefore said Defendant is entitled to a set-off in said amount against any judgment or recovery Plaintiffs may recover against this Defendant.

FOURTEENTH AFFIRMATIVE DEFENSE

AS AND FOR A FOURTEENTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs failed to mitigate, minimize or avoid damages allegedly caused by Defendant, and Defendant is therefore entitled to have any sum to which Plaintiffs are entitled reduced by such sums as would have been mitigated, minimized or avoided.

FIFTEENTH AFFIRMATIVE DEFENSE

AS AND FOR A FIFTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that defendant's conduct alleged by plaintiffs, of which they complain, was at all times relevant, justified, privileged or otherwise reasonable.

SIXTEENTH AFFIRMATIVE DEFENSE

AS AND FOR A SIXTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that plaintiffs knowingly and voluntarily consented to the treatment rendered by this answering defendant and were advised of all of the necessary potential risks, complications, benefits and alternatives of that treatment.

SEVENTEENTH AFFIRMATIVE DEFENSE

AS AND FOR A SEVENTEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that plaintiffs' action is barred by the provisions of California Civil Code section 1714.8, in that the injuries and damages complained of by plaintiffs, if any, were solely as the result of the natural course of a disease or condition and/or expected result of reasonable treatment rendered for the disease or condition by this answering defendant.

EIGHTEENTH AFFIRMATIVE DEFENSE

AS AND FOR AN EIGHTEENTH SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that the alleged injuries and damages, if any, were the result of unavoidable circumstances that could not have been prevented by any person, including this answering defendant.

NINETEENTH AFFIRMATIVE DEFENSE

AS AND FOR A NINETEENTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that the injury, damage or loss suffered by the plaintiffs herein are legally caused by the negligent or willful failure of the plaintiffs to follow the advice and instructions of the attending health care providers, including this answering defendant, and in otherwise failing to exercise ordinary care on his own behalf.

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TWENTIETH AFFIRMATIVE DEFENSE

AS AND FOR A TWENTIETH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that plaintiffs' alleged injuries, if any, occurred while plaintiffs were under the care and/or control of individuals or entities other than this answering defendant.

TWENTY-FIRST AFFIRMATIVE DEFENSE

AS AND FOR A TWENTY-FIRST, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that it is entitled to the full benefits and protections provided under sections 1430 et seq., of the Civil Code (Proposition 51), otherwise entitled the Fair Responsibility Act of 1986.

TWENTY-SECOND AFFIRMATIVE DEFENSE

AS AND FOR A TWENTY-SECOND, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that plaintiffs did not detrimentally rely upon any alleged representations or warranties made by this answering defendant. Plaintiffs have failed to state facts sufficient to support a cause of action for breach of warranty, express or implied, against this answering defendant.

TWENTY-THIRD AFFIRMATIVE DEFENSE

AS AND FOR A TWENTY-THIRD, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs' complaint fails to state a claim against this answering defendant upon which relief can be granted as to attorney's fees, costs, expenses, prejudgment interest, post-judgment interest, estoppel or restitution.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

AS AND FOR A TWENTY-FOURTH, SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, this answering defendant alleges that Plaintiffs' complaint fails to state a claim against this answering defendant upon which punitive or exemplary damages could or should be awarded against this answering defendant. There is no act or omission pursuant to which Plaintiffs can recover punitive damages against this answering defendant, such that recovery of punitive or

1 exemplary damages would violate the state and federal constitutional rights of this answering
2 defendant.

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4 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

5 AS AND FOR A TWENTY-FIFTH, SEPARATE, DISTINCT AND AFFIRMATIVE
6 DEFENSE, plaintiffs' demand for punitive or exemplary damages from this answering defendant,
7 if they are so sought, violates the provisions of California Code of Civil Procedure §425.13.

8 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

9 AS AND FOR A TWENTY-SIXTH, SEPARATE, DISTINCT AND AFFIRMATIVE
10 DEFENSE, this answering defendant alleges that Plaintiffs' complaint fails to state a claim for
11 unlawful conduct under the California Consumer Legal Remedies Act, California Civil Code §§
12 1750 *et seq.* because this statute is inapplicable to this action and/or to this answering defendant.

13 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

14 AS AND FOR A TWENTY-SEVENTH, SEPARATE, DISTINCT AND AFFIRMATIVE
15 DEFENSE, this answering defendant adopts and incorporates by reference all defenses pleaded by
16 the other defendants except to the extent that they are inconsistent to the specific affirmative
17 defenses pleaded in this Answer. This answering defendant has not completed its investigation of
18 this matter and reserves the right to amend his answer to allege such further factual or legal
19 defenses to Plaintiffs' Complaint which may be justified by the facts currently unknown to this
20 Defendant.

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1 Defendant denies that Plaintiffs have been injured in any amount, and raises the foregoing
2 as affirmative defenses only.

3 WHEREFORE, this answering defendant prays:

- 4 1. That Plaintiffs take nothing by way of their Complaint on file herein;
- 5 2. That this answering defendant be dismissed;
- 6 3. That this answering defendant recover costs of suit incurred herein;
- 7 4. And for such other and further relief as the Court may deem just and proper.

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9 Dated: January 4, 2008

LEWIS BRISBOIS BISGAARD & SMITH LLP

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11 By: Carol Sleeth
12 Daniel J. Meagher
13 Carol Sleeth
14 Attorneys for Defendant
15 CALIFORNIA PACIFIC MEDICAL CENTER
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